Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
And Competition Act of 1992	)	
	)	
Development of Competition and Diversity	)	CS Docket No. 01-290
In Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 775-3664

Jill Luckett
Vice President
Program Network Policy

Gregory L. Klein
Senior Director
Economic & Policy Analysis

December 3, 2001

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned Notice of Proposed Rulemaking. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable television customers and more than 200 program networks.

INTRODUCTION AND SUMMARY

In 1992, Congress adopted a 10-year ban on vertically-integrated, satellite-delivered cable programming networks entering into exclusive contracts with cable operators. That restriction expires in October 2002, unless the Federal Communications Commission ("Commission") finds in this proceeding that "such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[1]

[1] 47 U.S.C. §628(c)(5) (emphasis supplied.)

The exclusivity prohibition was enacted in a very different environment. The competitive landscape for the distribution of multichannel video programming has changed dramatically since then. In 1992, for example, direct broadcast satellite (DBS) had no customers. Today, DBS serves more than 17 million customers. In 1992, cable operators served more than 95 percent of all multichannel subscribers in 1992; today, cable serves fewer than 78 percent.

During the same period, the percentage of vertically-integrated program services has steadily declined and the number of alternatives to vertically-integrated satellite-delivered services has rapidly increased. Nearly half of all national programming services were vertically-integrated when the Act was passed; that percentage has dropped to 26 percent today.

This vigorous state of competitive alternatives to cable and the significant increase in national program services unaffiliated with cable operators have unhinged the original policy basis from the exclusivity ban. Continuing this assistance for cable's competitors is neither necessary nor appropriate. Prolonging the ban under these circumstances instead disserves competition and diversity. Accordingly, the Commission should allow the exclusivity ban to sunset in 2002.

ARGUMENT

I. THE EXCLUSIVITY BAN SHOULD SUNSET

A. Section 628(c)(5) Presumes that the Exclusivity Ban Will Sunset

For a ten-year period, Section 628(c)(2)(D) prohibits, in areas served by cable, an exclusive contract between a cable operator and a satellite cable programming vendor or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission finds that such an exclusive contract is in the public interest. This extraordinary interference with the right to freely contract was intended as a means of jump-starting additional competition to cable.[2] At that time, Congress believed that "vertically integrated program suppliers . . . ha[d] the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[3] Congress for a limited period thus barred exclusive contracts for the types of services that it deemed critical to spurring competition.[4]

Congress and the Commission did not intend this jumpstart to turn into a lifetime guarantee of access to this programming. Instead, it is a "'transitional mechanism until competition develops and consumers have adequate multichannel video programming alternatives.'"[5] Once that competitive marketplace of multichannel distributors developed, Congress believed it would be preferable to regulation.[6]

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[2] See, e.g., Section 628(a) (explaining purpose of program access provisions "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.")(emphasis supplied.); H.R. Rep. No. 102-862, 102d Cong. 2d Sess. 93 (hereinafter Conf. Rep.) ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.") See also 138 Cong. Rec. S14583-02 (daily ed. Sept. 22, 1992) (Statement of Senator Lieberman) (describing exclusivity ban as needed to "[g]et…real competition off the ground.").

[3] Sec. 2(a), P.L. 102-385 (1992).

[4] Congressman Tauzin, author of the exclusivity ban, explained that "exclusive programming that is not designed to kill the competition is still permitted" even under the existing prohibition. 138 Cong. Rec. H6534 (daily ed. July 23, 1992). The Act also provides a mechanism for making a showing to the FCC that exclusivity should be permitted even for satellite-delivered vertically-integrated services in particular cases. 47 U.S.C. §628(c)(4).

[5] First Report, 9 FCC Rcd. 7442, 7447 (1994) (quoting FCC's Notice of Inquiry); see also New England Cable News, 9 FCC Rcd. 3231, 3234 (1994) ("restrictions on exclusive contracts for this ten-year period are intended to foster the development of emerging competitors to cable, allowing a transition to full competition in the market for programming distribution.")

[6] See, e.g., id. Sec. 2(b)(statement of policy) (policy of the "Congress in this Act to …rely on the marketplace, to the maximum extent feasible, to achieve [the] availability [to the public of a diversity of views and information through cable television and other distribution media]").

The plain language of the statute and its legislative history make clear that there is a presumption that this transitional mechanism should sunset after the 10-year period. The exclusivity ban "shall expire after 10 years."[7] This presumption can be rebutted only upon a strong showing: that "[s]uch limitations are necessary to preserve and protect competition and diversity in the distribution of video programming."[8] As we now show, given the vigorous state of competition nearly ten years after the Act was passed and the concomitant decline in vertical integration, continuing this assistance for cable's competitors is neither necessary nor appropriate. Prolonging the ban instead disserves competition and diversity by disincenting cable operators to develop differentiated satellite-delivered services and by continuing to skew competition between program distributors.

B. Cable Faces Strong Competition in the Distribution of Video Programming

1. Non-Cable MVPDs Have Grown Nearly Ten-Fold Since 1992

At the same time as it adopted the exclusivity restriction, Congress required the FCC to annually report on the "status of competition in the market for the delivery of video competition."[9] Those reports chronicle a steady, continuing rise of competitive alternatives to cable. What role the exclusivity ban has played in this rise is debatable. What is undeniable is the fact that competition is here, and is here to stay.

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7 Conf. Rep. at 93.

8 Id. (emphasis supplied); Sec. 628(c)(5). See also 138 Cong. Rec. S14583-02 (daily ed. Sept. 22, 1992) (Statement of Senator Lieberman) ("The provision is narrowly tailored to its purpose of promoting competition; it disappears in 10 years unless the FCC explicitly finds that it continues to be necessary to preserve and protect competition and diversity in programming.") (emphasis supplied.)

9 Section 628(g).

The Notice of Proposed Rulemaking notes that while cable operators served 95.5% of all MVPD subscribers in 1992,[10] that percentage had fallen to 80% of MVPD subscribers as of its last Competition Report. More recent data provided in NCTA's Comments in the latest Competition Report Notice reveal that the downward trend has continued, with cable serving fewer than 78% of multichannel customers.[11]

A comparison of the First Report on Competition and the most recent – the Commission's Seventh Annual Report[12] – shows beyond dispute the extraordinary change in the competitive landscape since the 1992 Act. In 1992, multichannel competitors to cable comprised about a million C-band satellite dish customers, about 300,000 MMDS customers, and 1.3 million overbuild customers.[13] That situation had not changed materially by the time of the First Report in 1994. It noted that "most local markets for the distribution of multichannel video programming are highly concentrated, and for most consumers, cable television is the only provider of multichannel video programming."[14] Two years after the Act was passed, MMDS subscribership was up slightly with 550,000 customers[15]; SMATVs served fewer than a million customers[16], and home satellite dish users showed an increase to about two million subscribers.[17]

Today, cable competes with these providers and a wide range of others, both satellite and terrestrial. Last year's Seventh Annual Report acknowledged that "competitive alternatives and

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[10] Notice at ¶8.

[11] Comments of the National Cable & Telecommunications Association, CS Docket No. 01-129 (filed Aug. 2, 2001) at 9.

[12] 16 FCC Rcd. 6005 (2001) (hereinafter "Seventh Annual Report").

[13] Id.

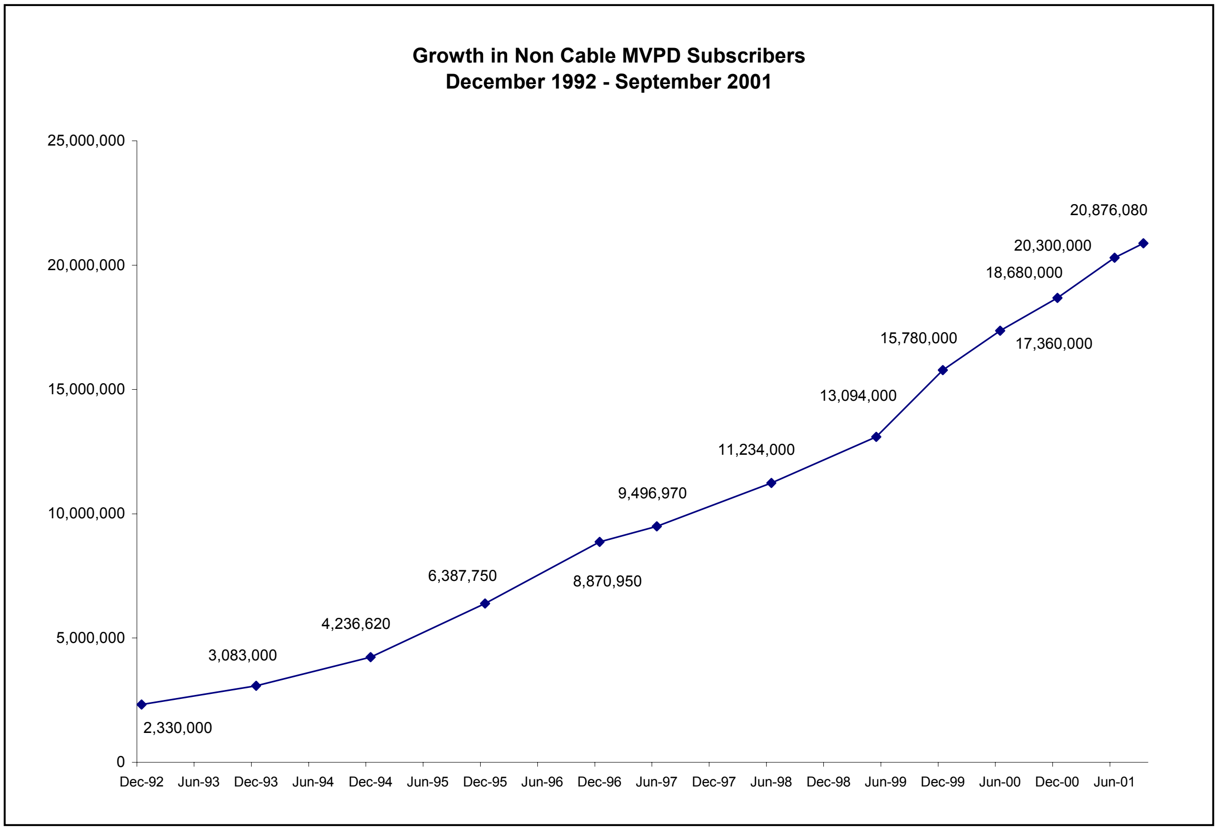
[14] First Report, 9 FCC Rcd. at 7540.

[15] Id. at 4782.

[16] Id. at 7488-89.

[17] Id. at 7480 (roughly half of four million HSD users subscribe to one or more programming services).

consumer choice continue to develop."[18] Customers have increasingly flocked to these alternatives, with non-cable subscribership growing nearly ten-fold from an aggregate of 2,330,000 non-cable MVPD customers in December 1992 to more than 20,876,000 in September 2001.



Source: 1992-June 2000 FCC Competition Report, Sept. 2001: NCTA Research

These multichannel video providers include a wide array of new entrants since 1992. NCTA's 2001 Annual Competition Report Comments detail how broadband overbuilders and utilities compete with cable in a variety of areas.[19] These MVPDs include terrestrial competitors such as RCN, Wide Open West, Western Integrated Networks, and Knology, which face off in offering cable programming, high-speed Internet access and telephony. But competition is not

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[18] Seventh Annual Report, 16 FCC Rcd. at 6008.

[19] NCTA Comments, Video Competition Report at 20-25.

limited to select areas. Because of the national reach of DBS, almost all television households have alternatives to their incumbent cable operators.

2. DBS is a Strong Competitor That is Here to Stay

While cable operators are clearly facing competition from a variety of sources, DBS in particular has proven itself as a competitive substitute for cable. DBS was more or less still on the drawing boards when the program access debate took place. In 1993, DBS had fewer than 70,000 customers.

Eight years later, the technology, program selection, and market status of DBS have been utterly transformed. Now a high-frequency, small dish, all digital offering with the fabled "500 channels" is nearly a reality. DBS is a formidable competitor. With the announced merger between the two largest DBS providers, a combined EchoStar/DirecTV would be the largest MVPD of all. Already, DirecTV and EchoStar are the third and sixth largest MVPDs, with 10.3 million and 6.4 million customers, respectively, as of September 30, 2001. The total number of DBS subscribers jumped from 14 million to 16.73 million between September 2000 and September 2001 – a 19 percent annual growth rate.

Top 12 MVPDs

AT&T Broadband	13,750,000
Time Warner Cable	12,654,000
DirecTV	10,341,000
Comcast	8,437,000
Charter	6,970,000
Echostar	6,430,000
Cox Communications	6,206,737
Adelphia	5,693,035
Cablevision Systems	2,988,590
Mediacom	1,585,000
Insight	1,275,500
CableOne	760,000

Source: NCTA Research based on Company 3Q data.

Combined, DBS serves nearly 17 million customers – over three million more than the largest cable multiple system operator ("MSO").

The DBS providers' position today is the result of a dramatic eight-year growth trend that has made DBS a firmly entrenched, continually expanding competitor to cable – a trend that shows no signs of ending. As the attached advertisement shows, DBS is aggressively challenging cable for customers nationwide.[20] With the passage of the Satellite Home Viewer Improvement Act in 1999, DBS companies have been able to retransmit local broadcast signals

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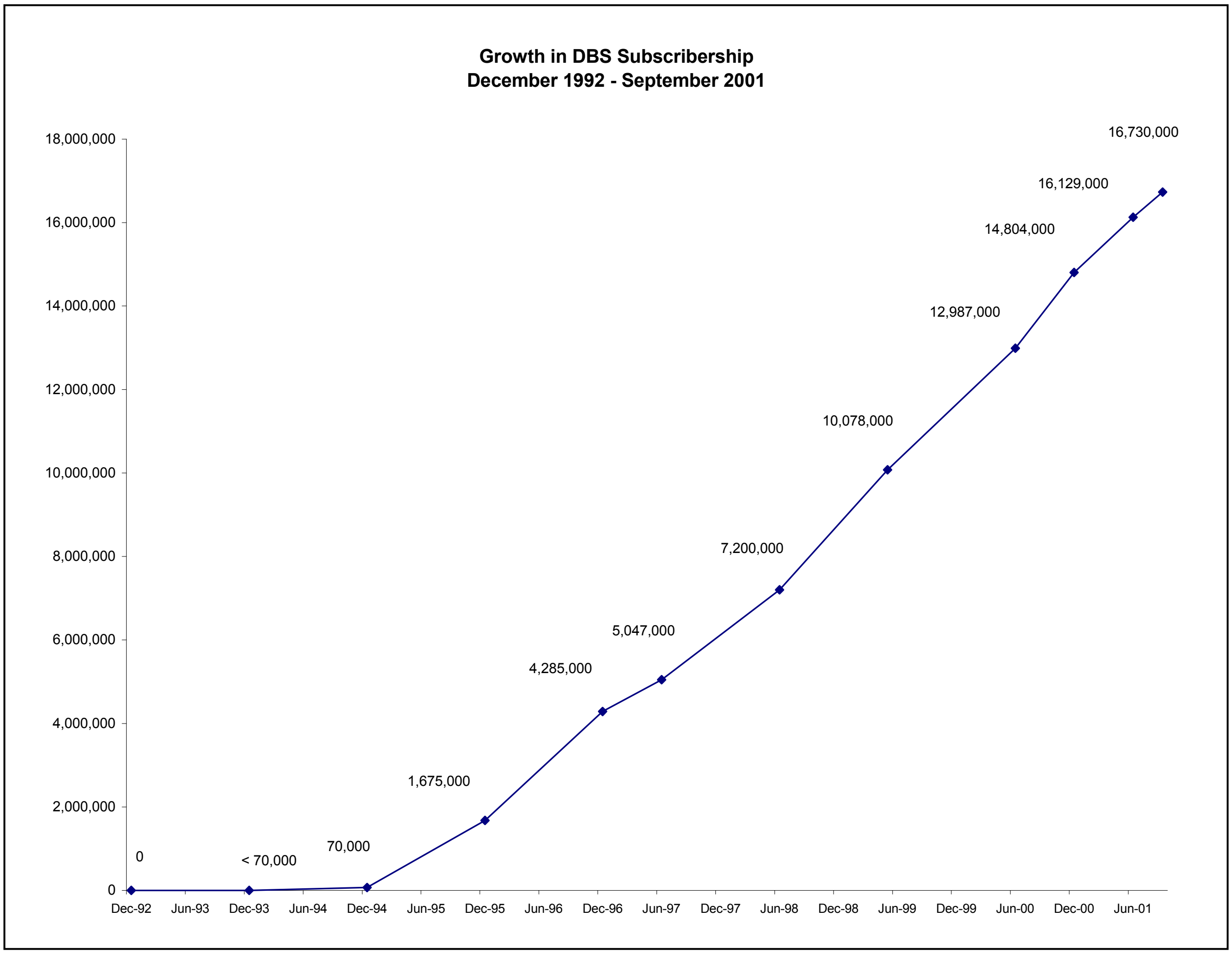
20 Attachment A

into their market of origin, removing what was perceived to be its primary disadvantage.[21] Currently, in combination, DirecTV and EchoStar provided local TV signals in 42 markets with more than 65 million television households.



The 2000 Seventh Annual Report shows that "DBS subscribership is growing in urban and suburban communities and is no longer viewed as a predominately rural service."[22] And

[21] See Sixth Annual Report, 15 FCC Rcd. 978, 1013 (2000).

[22] Seventh Annual Competition Report, 16 FCC Rcd. at 6038.

"[t]he trend is toward growth in all geographic areas."[23] As of July 2001, direct to home penetration exceeded 15 percent in 41 states, 25 percent in 16 states, and even 40 percent in one state.[24]

DBS has a nationwide reach, and can easily serve new customers. Each of these customers has access to hundreds of channels of programming. DirecTV, for example, offers up to 225 channels of service. EchoStar has up to 210 channels. A combined DirecTV/EchoStar could offer more than 400 channels, surpassing the average cable customer's 90 channels by a factor of more than four.

As the attached channel line-ups show, both DBS providers offer a wide array of programming to their customers – the same programming, and more, available from a cable operator.[25] And in a total turnaround of circumstances, the most valuable exclusive rights in subscription television – to the NFL's Sunday afternoon football package – are held by DirecTV, the third largest MVPD.

Thus, the answer is clear to the Notice's query about "the extent to which DBS operators impose effective competition on cable operators and the extent to which the exclusivity provision impacts this."[26] Franchise-by-franchise determinations of whether DBS meets the "effective competition" test for rate regulation purposes are unnecessary to show the dramatic impact on consumer choices nationwide provided by this alternative to cable.[27] And the

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23 Id. at 6038-39.

24 Media Business Corp., Sky Trends Report (July 2001).

25 Attachment B.

26 Notice at ¶8.

27 The FCC's "effective competition" rules provide that DBS and other competitors provide competition when they serve a sufficient number of customers with "comparable" programming. For these purposes, "comparable" programming means offering at least 12 channels of video programming, including at least one channel of non-broadcast service programming. 47 C.F.R. §76.905(g).

exclusivity prohibition has little bearing on DBS' effectiveness as a competitor, today or in the future. As described below, only a relative handful of the hundreds of channels offered by DBS is even covered by the rules today. And the growth of DBS ensures that it will have no difficulty gaining access to most satellite-delivered programming services or creating its own.

3. The Percentage of Vertically-Integrated Programming Services Has Sharply Declined

The dramatic growth over the last decade in the number of multichannel customers subscribing to alternatives to cable is only part of the picture. The increase in diverse program services in which cable operators have no ownership interest has totally changed the landscape from 1992.

At that time, members of Congress expressed concern that "there [were] only five big cable integrated companies that control it all. [The Tauzin] amendment says to those big five, 'You cannot refuse to deal any more.'"[28] In 1992, there were only 45 non-vertically integrated satellite-delivered services. Today, there are more than 200 services offered nationally by satellite that have no cable ownership. These networks compete with vertically-integrated networks for viewers, offering a variety of programming genres such as news, children's, music and general interest programming, among others. While nearly half of all national programming services were vertically integrated in 1992, that percentage has dropped to 26 percent today. And no single cable company has ownership interests in more than 9 percent of satellite-delivered programming services.

[28] 138 Cong. Rec. H6487-01 (daily ed. July 23, 1992) (statement of Congressman Tauzin).

Year	Number of Vertically Integrated Services	*Percent of Vertically Integrated Services*	Number of Non-Vertically Integrated Services	*Percent of Non-Vertically Integrated Services*	Total Number of National Programming Services
1992	42	***48%***	45	***52%***	87
1994	56	*53%*	50	*47%*	106
1995	66	*51%*	63	*49%*	129
1996	67	*46%*	80	*54%*	147
1997	68	*40%*	104	*60%*	172
1998	95	*39%*	150	*61%*	245
1999	104	*37%*	179	*63%*	283
2000	99	*35%*	182	*65%*	281
2001	73	***26%***	208	***74%***	281

Source: 1994-2000 FCC Annual Competition Reports; NCTA Research

Congress also worried that cable operators controlled not just a relatively large number of satellite-delivered program networks, but also the most popular networks. The exclusivity ban was prompted by the concern that "[t]he hot shows are controlled by cable. The good shows, the good programs only come to you on the cable."[29] The FCC's First Competition Report noted that "[a]ll the successful channels that were introduced after passage of the 1984 Cable Act were affiliated with cable system operators, and [in 1994], vertically integrated national programming services continue to dominate the group of services that are most widely viewed. Twelve of the top fifteen most-watched services, according to prime-time rankings, are vertically integrated, an increase from ten in 1990."[30] Cable had interests in fifteen of the top 25 networks in 1994.[31]

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29 Id.

30 First Report, 9 FCC Rcd. at 7522.

31 Id. at 7522-23.

That, too, has changed. The Seventh Annual Competition Report shows that only 9 of the top 20 networks (in terms of subscribership) – and 5 of the top 10 networks – were vertically integrated in 2000.[32] Only 6 of the top fifteen most watched services, according to prime-time ratings, are vertically integrated today.[33]

Vertically-integrated networks are now the exception, not the rule. Strong competitive alternatives to cable-owned networks abound. In the face of these developments, there is no reason to think that this robust competitive marketplace would be at all threatened absent the exclusivity ban.

II. THE EXCLUSIVITY BAN IS NOT NECESSARY TO PRESERVE COMPETITION AND DIVERSITY IN THE DISTRIBUTION OF VIDEO PROGRAMMING

A. Competition to Cable is Expected to Intensify

DBS is an enduring competitor to cable and would face no threat if the exclusivity prohibition were to sunset. The largest DBS provider, DirecTV, in fact has millions more subscribers today than even the largest cable operator had in January 1992.[34] And EchoStar has nearly as many.

Analysts agree that the trend of ever-increasing competitive alternatives to cable will continue. Various research groups this year "are all saying one and the same thing: point-to-point direct broadcast satellite (DBS) remains to be very very hot."[35]

DirecTV predicts that it will add between 1 million and 1.2 million new subscribers in 2002.[36] EchoStar expects net subscriber additions to total between 1.5 and 1.75 million in 2001,

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[32] Seventh Annual Report at Table D-6.

[33] Id. at Table D-7.

[34] TCI had 6,441,000 subscribers as of December 31, 1991. Cable TV Investor, Feb. 29, 1992 at 10. EchoStar has 6,430,000 subscribers, and DirecTV has 10,300,000 customers, as of September 30, 2001.

with similar gains predicted in 2002.[37] And cable will face a competitive powerhouse in the form of a combined DirecTV/EchoStar, which plans to take dead aim at cable across the country. Overall, non-cable MVPDs are projected to serve 25% of MVPD customers by next year.[38]

In short, there is no reason to believe that these competitive gains will unravel – and every reason to expect competition to intensify, with competitors continuing to garner customers at cable's expense.

B. Eliminating the Ban on Exclusivity Will Not Threaten Diversity in the Distribution of Programming

As described above, hundreds of national, satellite-delivered programming services are not vertically integrated today. The decrease in the relative percentage of vertically-integrated services means that even if every one of those affiliated services were to be available only on cable, competing MVPDs still would have access to an abundance of program networks. Those networks include some of the most popular programming available.

But there is no real threat of a wide-scale withdrawal of the vertically-integrated programming that non-cable customers enjoy today. Even absent a statutory ban on exclusivity, strong incentives remain to provide programming – vertically integrated or not – to all MVPDs. Virtually all programmers rely on subscription revenues to support their programming efforts. And advertiser-supported cable networks compete vigorously for access to as many households as possible in order to maximize their advertising sales. Now that cable's competitors serve more than 20 percent of available households, widely viewed networks that denied their services to those competitors would forgo significant revenue. Not surprisingly, nearly all non-vertically

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35 www.satnews.com/feature/feature-dbs-pp.html

36 Video Business Online, "DirecTV parent sees 10% growth next year," www.videobusiness.com/news/111401.

37 "EchoStar reports Q3 profit on subscriber growth," biz.yahoo.com/rf/011023/n23236477-3.html.

integrated satellite-delivered program networks are available on DBS as well as cable even absent the applicability of the exclusivity ban to these services. And, as described above, vertically-integrated services compete with these services for viewers and advertising dollars. Thus, strong reasons remain for established vertically-integrated programmers to continue to deal with competing distributors.

The allure of DBS coverage for new networks, vertically or non-vertically integrated, is also strong. Unlike the variety of channel positions and system configurations involved in cable system launching, a deal with a DBS provider means immediate nation-wide reach to millions of homes in the same channel position.[39] For example, DirecTV served as The National Geographic Channel's largest distributor upon its launch in 2001.[40]

This is not to say that if the ban were to sunset exclusive arrangements would never arise. Rather, in order to differentiate a cable system from its competitors, new programming created only for cable may well develop. But such a development would increase, not decrease, competition and diversity.

C. Eliminating the Ban Would Serve the Interests in Increased Competition and Diversity

The Notice seeks comment on the "potential beneficial effects of exclusivity in the multichannel video programming marketplace."[41] As courts, economists, and antitrust experts

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38 Media Index Database, Kagan Media Money, June 26, 2001, at 11.

39 See, e.g., Kagan Cable Investor (Mar. 13, 1998) at 12 ("A DBS affiliation pact also means an instant national launch – unlike a cable MSO-level agreement that promises only a gradual, system-by-system roll-out as channel capacity becomes available.")

40 www.directv.com/pressdel/0,1112,392,00.html (announcing January 2001 launch of The National Geographic Channel on DirecTV – "The National Geographic Channel's largest distributor at launch.")

41 Notice at ¶10.

have recognized, most exclusive contracts promote rather than diminish competition and consumer welfare. As the U.S. Supreme Court noted,

> Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers …. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products… The availability and quality of such services affect a manufacturer's goodwill and competitiveness of this product. Because of market imperfections such as the so-called 'free-ride' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[42]

This is true for exclusive programming contracts as well. The Commission has generally embraced exclusive rights for programming.[43] And it has specifically acknowledged that exclusive contracts for cable programming could increase viewing alternatives and promote a competitive programming environment.

It found that "exclusivity arrangements are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product. In this manner, exclusive distribution may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market."[44] Exclusivity may also be useful – or even critical – to obtaining financial support for services with more limited appeal.[45] As the Court of Appeals

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[42] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n. 19 (1977).

[43] See, e.g., Amendment of Parts 73 and 76 of the Commission's Rules relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, 5309 (1988) ("[a]ll commenters agree that the ability to enter into exclusive contracts is a widely used competitive tool that is important to program suppliers, cable operators, and broadcasters.")

[44] New England Cable News, 9 FCC Rcd. 3231 (1994) (granting exclusivity petition for startup regional news service.)

[45] Id.

recognized in Time Warner Entertainment Co. LP v. FCC,[46] the existing exclusivity ban may reduce incentives to develop programming: "because the ability to enter into exclusive contracts could create economic incentives to invest in the development of new programming, prohibiting such contracts might result in reduced programming – that is, less speech."

Moreover, exclusivity would permit cable operators to differentiate themselves from their competitors. In so doing, it would lead to more diverse programming for consumers.[47] And it would free cable from the asymmetric regulation that permits DBS and other non-cable MVPDs to differentiate their national programming when competing against cable but prohibits cable from doing the same.

The existing ban on exclusivity not only unfairly interferes with competition between cable operators and their MVPD rivals. It also skews competition between cable-affiliated and non-cable affiliated programming services. Elimination of the exclusivity ban will increase competition among program networks by restoring to cable-affiliated networks one contract right they have been denied since 1992.

Finally, even during this ten-year period Section 628 expressly allows the Commission to permit particular exclusive arrangements between affiliated satellite-delivered networks and cable operators, provided they make a showing under the five factors enumerated in the statute.[48]

46 93 F. 3d 957, 979 (D.C. Cir. 1996). The court upheld the ban against a facial constitutional challenge, finding that Congress concluded that "the increased speech that would result from fairer competition in the video programming marketplace – outweighed the disadvantages – the possibility of reduced economic incentives to develop new programming."

47 See Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd. 3105, 3126 (1994) (approving DBS exclusive contracts with vertically-integrated cable programming networks.)

48 These factors are: (1) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (2) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable; (3) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (4) the effect of such exclusive contract on diversity of programming in the multichanel video programming distribution market; and (5) the duration of the exclusive contract. 47 U.S.C. §628(c)(4).

The Notice asks whether, rather then eliminating the ban, it should continue to rely on this case-by-case approach to determine whether to permit exclusive arrangements for satellite-delivered programming.[49] Given the competitive environment today, it makes little sense to continue to burden cable programmers and operators with the need for prior approval. That approval process introduces unnecessary costs, uncertainty and delay into program carriage. It is no substitute for the freedom from regulatory intrusion into private contracting that Congress envisioned would occur when competition is as robust as it is today.

Moreover, the existing process is designed to place a high hurdle to any finding in favor of a public interest waiver. The existing public interest waiver standard contains no requirement that those in opposition show any harm to competition at all.[50] Moreover, the onus is on the cable parties to demonstrate that the statutory factors are met rather than on those seeking to burden programmers and operators.[51]

Congress believed that a case-by-case approach could be used side-by-side with the ten-year exclusivity ban, not that it should continue once competition has taken hold.

* * * * *

In short, unshackling cable operators and their affiliated programmers from the exclusivity ban would increase competition and diversity. It may also provide marketplace incentives for cable's competitors to develop their own programming, rather than relying on the risk-taking efforts of others once a service has gained consumer interest. Surely DirecTV and

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49 See Notice at ¶10.

50 Program Access Order, 8 FCC Rcd. at 3363. See also Time Warner Cable, 9 FCC Rcd. 3221, 3226 (1994)(analysis "[d]oes not require a specific showing of 'harm' to competitors by those opposing exclusivity.")

51 Program Access Order, 8 FCC Rcd. at 3384 (finding that exclusivity "is not favored", and that "the burden must be on the party seeking exclusivity to demonstrate persuasively that it is justified.")

EchoStar are of sufficient size – alone or in combination – to create their own satellite-delivered programming services.

CONCLUSION

The exclusivity ban is a relic of a bygone chapter in cable regulation. The time for providing an incubation period for fledgling competitors to cable has long passed. The exclusivity prohibition has no place in today's vibrant, competitive multichannel video programming environment. Failing to eliminate the ban would do harm to the very interests it was meant to advance – competition and program diversity. The FCC should allow it to sunset.

Respectfully submitted,

/s/ Daniel L. Brenner

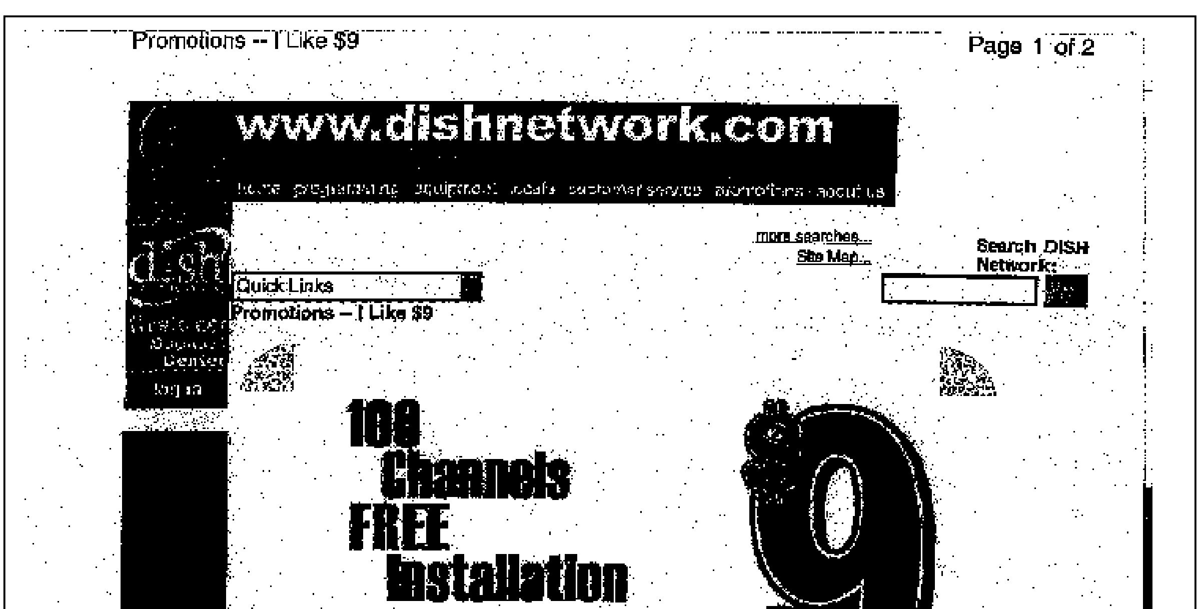
Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 775-3664

Jill Luckett
Vice President
Program Network Policy

Gregory L. Klein
Senior Director
Economic & Policy Analysis

December 3, 2001

ATTACHMENT A



ATTACHMENT B

Network	DirecTV	Dish Network
A&E	☐	☐
American Movie Classics	☐	☐
America's Collectibles Network		☐
Angel One		☐
Animal Planet	☐	☐
Answer Channel		☐
Antenna TV		☐
Arirang TV		☐
Art		☐
BBC America	☐	☐
Beauty and Fashion Channel		☐
Beste van Vlaanderen en Nederland		☐
BET	☐	☐
Black Starz	☐	
Biography	☐	☐
Bloomberg Television	☐	☐

Network	**DirecTV**	**Dish Network**
Disney (West)	☐	☐
Do It Yourself Network	☐	☐
E! Entertainment	☐	☐
Empire Sports Network	☐	☐
Encore Action	☐	☐
Encore East	☐	☐
Encore Love Stories	☐	☐
Encore Mystery	☐	☐
Encore True Stories	☐	☐
Encore WAM!	☐	☐
Encore West	☐	☐
Encore Westerns		☐
ERT		☐
The Erotic Network		☐
Erotic Television Clips		☐

Network	DirecTV	Dish Network
Fox Sports Net Pittsburgh	☐	☐
Fox Sports Net Rocky Mtn.	☐	☐
Fox Sports Net South	☐	☐
Fox Sports Net Southwest	☐	☐
Fox Sports Net West	☐	☐
Fox Sports Net West 2	☐	
Fox Sports World	☐	☐
Free Speech TV		☐
FX	☐	☐
Fox News Channel	☐	☐
Galavision	☐	☐
Game Shopping Network		☐
Gems Show Network	☐	☐
The Golf Channel	☐	☐
Good Samaritan		☐
Great American Country		☐

Network	DirecTV	Dish Network
MLS/ESPN Shootout	☐	
MSNBC	☐	☐
The Movie Channel East	☐	☐
The Movie Channel 2 East		☐
The Movie Channel West	☐	☐
The Movie Channel 2 West		☐
The Movie Channel Extra West		☐
MTV	☐	☐
MTV South		☐
MTV 2	☐	☐
MuchMusic	☐	
Mystery		☐
NASA		☐
National Geographic		☐
NBA League Pass	☐	

Network	DirecTV	Dish Network
Record International		☐
Research Channel		☐
RFI		☐
Romance Classics		☐
RTPi		☐
SCI FI Channel	☐	☐
Shop NBC	☐	
Shop at Home		☐
Showtime East	☐	☐
Showtime Extreme	☐	☐
Showtime Three	☐	☐
Showtime Too	☐	☐
Showtime West	☐	☐
Soap Net	☐	☐
Speedvision	☐	☐
Starz! East	☐	☐

Network	DirecTV	Dish Network
VHI	□	□
VHI Classic	□	□
WE: Women's Entertainment	□	
Weather Channel	□	□
WGN Superstation	□	□
Wisdom TV		□
WNBA Season Pass	□	
WorldLink TV	□	